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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE COVARRUBIAS QUINTERO, Defendant and Appellant.	A155836 (Napa County Super. Ct. No. CR123712)

Defendant Jose Quintero appeals the denial of his motion to vacate a 2005 conviction under California Penal Code section 1473.7 due to alleged error affecting his ability to understand and accept possible immigration consequences. We affirm.

BACKGROUND

I. Defendant's Background

Defendant is a citizen of Mexico who entered the United States in May 1999 without being inspected. Defendant married a legal permanent resident with whom he has four minor United States citizen children.

II. Charged Incident

On July 24, 2005, defendant was driving with two of his children when he attempted to pass traffic and collided with another vehicle. The vehicle defendant hit rolled over several times before it stopped on its roof, trapping the driver inside. The driver was later taken to a hospital, where he was treated for an abrasion to his forehead and pain in his right shoulder and left knee.

Defendant continued driving. A witness to the crash followed defendant and called the police. A California Highway Patrol Officer responded and located defendant and his children walking toward a gas station seven miles from the accident. The officer noticed damage to defendant's car, which was parked nearby.

The officer approached defendant and asked for his driver's license. Defendant was unable to provide identification. As the officer spoke with defendant, he smelled alcohol on defendant's breath and saw that his eyes were droopy and bloodshot. The officer asked defendant to blow twice into a preliminary alcohol screening device, which registered his blood alcohol level as .142 and .162 percent.

Defendant admitted he had consumed three drinks before crashing into the victim's car. He claimed he had fled because he was scared.

The officer arrested defendant and released the two children to their mother. After his arrest, defendant submitted to a blood alcohol test, which showed his blood alcohol content was .14 percent, or nearly twice the legal limit.

III. Charges Filed

On July 26, 2005, the Napa County District Attorney's Office filed a complaint against defendant charging him with one count of felony driving under the influence causing injury, one count of felony driving with .08 percent blood alcohol causing injury, one count of felony leaving the scene of an accident, and two counts of felony child abuse. On September 14, 2005, the Napa County District Attorney's Office filed an information with the same charges against defendant after defendant waived his right to a preliminary hearing.

IV. Plea Agreement & Sentencing

The prosecution extended a plea deal to defendant. It agreed to reduce three felony counts—the count for driving under the influence causing injury and the two counts of child abuse—to misdemeanors and to dismiss the felony count for driving with .08 percent blood alcohol causing injury. Defendant would then plead guilty to one felony count of leaving the scene of an accident and the three misdemeanor counts. Defendant agreed to be placed on probation and serve 270 days in custody.

Defendant accepted the agreement and entered guilty pleas to the single felony count and three misdemeanor counts on September 27, 2005. His change of plea form stated that he was assisted by a Spanish interpreter. It contained a written acknowledgment warning that, if defendant was not a United States citizen, "a plea of guilty or no contest could result in [his] deportation, exclusion from admission to this country, or denial of naturalization." Defendant signed the end of the plea form, which lists two dates next to his name: August 25, 2005 and September 27, 2005.[1]

The trial court sentenced defendant approximately one month after he pled guilty. The driver addressed the trial court before the sentence was imposed, informing the court that the accident had "totally totaled" his vehicle and injured him so badly that he was unable to work for a while. As the amount of restitution was uncertain at that time, the trial court requested that probation assess the restitution owed to the driver. Probation later determined the restitution to be $18,482.11, including the entire value of the unsalvageable vehicle and several thousand dollars for lost wages and medical bills. The trial court imposed the agreed-upon sentence and ordered defendant to pay the full amount of restitution.

V. Proceedings to Vacate His Conviction

A. Defendant's Motion & Declaration to Vacate His Convictions

Defendant filed a motion to vacate his conviction under Penal Code section 1473.7 after receiving a notice to appear in immigration court for removal proceedings in six months. Defendant attached to his motion an initial declaration describing the accident. According to that declaration, defendant was driving with his children in his car when he was "involved in a small fender-bender with another car . . . [driving] without its lights on." He stopped to exchange information with the driver whom he had hit. But, as defendant only had an out-of-state license, the driver wanted to confirm where he lived and asked to follow him home. On their way to his home, the driver called the police. The police arrested defendant for what he believed was a hit-and-run. Due to his poor

[1] The transcript of defendant's change of plea is no longer available.

English, defendant was unable to explain that he had left the scene of the accident because the driver had told him to drive home to confirm where he lived.

Defendant further stated that his family had hired a private defense attorney, James McEntee, to represent him a week after his arrest. However, defendant could not communicate with McEntee because of his poor English and McEntee's inability to speak Spanish. Defendant claimed that McEntee told him to sign a plea form without an interpreter when he visited defendant in jail on August 25, 2005. Defendant further asserts that McEntee never read the plea agreement or explained its attendant immigration consequences to him. McEntee only told him that a judge would sentence him to three years in jail if he did not sign.

Defendant concluded his declaration by explaining that he was planning to adjust his immigration status through his wife, who was a lawful permanent resident, and that he would have fought the charges had he known pleading guilty would render him inadmissible and therefore unable to adjust his status.

Defendant submitted a second declaration concerning the accident to the trial court on September 6, 2018. In that declaration, defendant explained that he was returning from a barbeque when he crashed into the driver after an ill-fated attempt to pass a few cars. He saw the car with which he collided veer off the road to the right.

When he stopped his car to exchange information, another person drove up to him and claimed to be the driver's friend. The driver's friend demanded to know whether defendant would pay for the damage he had caused. Defendant said that he would pay, provided the driver's friend with his contact information (including his address), and showed him his out-of-state driver's license. When the driver's friend asked how he could trust that defendant lived at the address defendant had provided, defendant told the driver's friend to follow him home. The driver's friend agreed, so he started driving home as the driver's friend followed.

After two miles, defendant pulled over because his car was heating up. The friend also stopped and watched defendant as he called his wife to pick up him and his children. An officer arrived soon after he stopped. He offered the officer his Washington State

driver's license, but the officer rejected it. He tried to speak with the officer, but he was unable to do so because of his poor English. Defendant does not understand why the driver's friend told the officer that he did not stop.

B. Evidentiary Hearing on Motion to Vacate Defendant's Convictions

The trial court held a hearing on defendant's motion to vacate on October 19, 2018. Defendant planned to call two witnesses at the hearing on his motion to vacate his plea: McEntee and himself. However, as McEntee's testimony took longer than anticipated, the parties stipulated to the trial court's consideration of defendant's declarations without cross-examination.

McEntee testified that he had represented defendant in the 2005 case. During the pendency of that case, McEntee visited defendant once in jail and brought a Spanish interpreter to assist him. He otherwise met defendant on four occasions in court.

To better represent defendant, McEntee confirmed defendant was neither a United States citizen nor lawfully present in the United States. McEntee then attempted to determine whether a guilty plea would have any immigration consequences by consulting relevant materials from the California Public Defender's Association. Based on these materials, he believed that felony child abuse likely to produce great bodily harm under Penal Code section 273a, subdivision (a) was a "divisible statute,"[2] which could be violated by inflicting pain or by placing a child in danger. Violating Penal Code section 273a, subdivision (a) by placing a child in danger was not a crime involving moral turpitude (CIMT), which might render defendant deportable or ineligible for certain types

[2] The U.S. Supreme Court has distinguished between "indivisible" statutes, which set forth a single set of elements to define a given crime, and divisible statutes, which list elements in the alternative and thereby define multiple crimes. (*Mathis v. United States* (2016) 136 S.Ct. 2243, 2248–2249.) If a statute is divisible, like Penal Code section 273a, subdivision (b), a court applies a "modified categorical" approach to determine what crime (and therefore what elements) a defendant was convicted of committing. (*Id.* at p. 2249.) The court then compares the elements of that crime with the elements of the federal generic offense to determine whether the elements of both crimes align. (*Id.* at pp. 2248–2249.) Placing a child in danger and inflicting pain on a child are arguably two different crimes covered by California Penal Code section 273a, subdivision (b).

of immigration relief, while inflicting pain was a CIMT with possible immigration consequences. He therefore considered a plea to a misdemeanor violation of Penal Code section 273a, subdivision (b) for placing two children in danger to be an immigration-safe plea. McEntee was also weighing the need to get defendant out of custody as soon as possible because "he stood a greater chance of being apprehended and immediately deported if immigration services found him in the jail."

McEntee met with two deputy district attorneys assigned successively to defendant's case to negotiate a plea deal. He attempted to persuade the assigned deputy district attorneys to reduce all counts to misdemeanors, but they refused to do so. However, he was able to secure the previously discussed plea deal reducing all but one charge from felonies to misdemeanors. Defendant would plead guilty to three misdemeanors and one felony, and the District Attorney would dismiss one felony.

After securing a plea deal, McEntee explained to defendant that pleading guilty could result in his deportation, removal, or exclusion. But he also warned defendant that immigration authorities were more likely to find him and deport him the longer he remained in custody. He briefly discussed going to trial but advised defendant against it because it would be hard to dispute the independent witnesses and blood alcohol tests. McEntee told defendant that his outcome would likely be worse if he went to trial. Defendant accepted the plea deal and filled out the plea form in court.

C. Trial Court's Denial of Motion to Vacate Defendant's Convictions

The trial court denied defendant's motion to vacate his conviction. It found that defendant was assisted by a Spanish interpreter when McEntee explained the plea offer to defendant and when defendant entered his change of plea in court. The trial court also found that McEntee had advised defendant of the possible immigration consequences of pleading guilty. The court noted that it did not believe defense attorneys were also required to be immigration attorneys.

The trial court was unconvinced defendant would have rejected the offer given the dismissal of one felony charge and the reduction of three of the five felony charges to misdemeanors. It noted that defendant's conduct was egregious, as he endangered his

two children by driving with a high blood alcohol level and crashed into another car, injuring the driver.

DISCUSSION

Defendant asserts he would not have pled guilty had he understood the immigration consequences of doing so. We first note the applicable standard of review and the showing necessary for relief under Penal Code section 1473.7. We then analyze the potential immigration consequences of defendant's plea to determine whether defense counsel's advisement was accurate before turning to whether defendant would have rejected the plea had he known the consequences. Finally, we address defendant's claim that he was prejudiced by ineffective assistance of counsel.

I. Standard of Review

When reviewing an order denying a section 1473.7 motion, "[w]e defer to the trial court's factual determinations if supported by substantial evidence[] but exercise our independent judgment to decide whether the facts demonstrate [prejudicial error]." (*People v. Chen* (2019) 36 Cal.App.5th 1052, 1058 (*Chen*), citing *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.)

II. Governing Legal Framework

Penal Code section 1473.7 authorizes a person who is no longer in criminal custody to move to vacate a conviction or sentence where the "conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (Pen. Code, § 1473.7, subd. (a)(1).) Effective January 2019, before this appeal was fully briefed but after the trial court had ruled on the motion below, our Legislature amended the statute to clarify that a finding of "legal invalidity may, but need not, include a finding of ineffective assistance of counsel." (*Ibid.*)

A defendant seeking to vacate his conviction under Penal Code section 1473.7 must demonstrate a reasonable probability that he would not have pled guilty had he

understood the immigration consequences of pleading and that his failure to understand was due counsel's misadvice or failure to advise him of the attendant immigration consequences. (*Chen*, *supra*, 36 Cal.App.5th at p. 1058, citing *People v. Camacho* (2019) 32 Cal.App.5th 998, 1011–1012.) To determine whether a defendant would not have pled guilty, a court must examine "the record for corroboration and consider the likelihood of success at trial, the potential consequences after a trial compared to the consequences flowing from the guilty plea, and the importance of immigration consequences to the defendant." (*Chen*, at p. 1060, citing *Lee v. United States* __ U.S. at p. __ [137 S.Ct 1958].) In a related context, the United States Supreme Court has instructed that courts should also "look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee*, *supra*, __ U.S. __ [137 S.Ct. at p. 1967] [petition to set aside guilty plea based on incorrect advice regarding immigration consequences pursuant to 28 U.S.C. § 2255]; see *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223–224 (*Cruz-Lopez*).) " '[C]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies.' " (*In re Hernandez* (2019) 33 Cal.App.5th 530, 547, quoting *Lee*, *supra*, __ U.S. at p. __ [137 S.Ct. at p. 1967].)

III. Analysis

A. Possible Immigration Relief

Defendant claims his guilty plea to two misdemeanor counts of violating Penal Code section 273a, subdivision (b) rendered him ineligible for cancellation of removal, a form of discretionary immigration relief, because these convictions either constitute CIMTs under 8 United States Code section 1227, subdivision (a)(2)(A)(i), or crimes constituting child abuse under 8 United States Code section 1227, subdivision (a)(2)(E)(i). He further asserts that McEntee failed to inform him that his plea to two counts of violating Penal Code section 273a, subdivision (b) would have potential immigration consequences. We accordingly examine whether defendant's convictions resulted in known adverse immigration consequences at the time defendant pled guilty to determine whether to apply Penal Code section 1473.7. We also analyze whether the

advice McEntee provided defendant would have allowed him to understand the possible immigration consequences of accepting the plea deal.

We begin by determining whether defendant's plea rendered him ineligible for cancellation of removal. Any alien who is inadmissible or deportable from the United States may apply for cancellation of removal if he "(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." (8 U.S.C. § 1229b, subd. (b).)

As relevant to this appeal, 8 United States Code section 1182, subdivision (a)(2)(A)(i)(*l*) includes any crime "involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."[3] Section 1227, subdivision (a)(2)(E)(i) of title 8 of the United States Code, includes, as relevant to this appeal, any alien "who at any time after admission is convicted of a . . . crime of child abuse, child

[3] " '[T]he federal generic definition of a CIMT is a crime involving fraud or conduct that 1) is vile, base, or depraved and 2) violates accepted moral standards.' [Citations] '[F]raud crimes are categorically crimes involving moral turpitude, simply by virtue of their fraudulent nature.' [Citation.] 'Non-fraudulent CIMTs "almost always involve an intent to harm someone," ' [citation], or 'intent to injure, actual injury, or a protected class of victim,' [Citation]. In determining whether an offense is a CIMT, the [Board of Immigration Appeals] has examined 'whether the act is accompanied by a vicious motive or a corrupt mind' because 'evil or malicious intent is . . . the essence of moral turpitude.' " (*Linares-Gonzalez v. Lynch* (9th Cir. 2016) 823 F.3d 508, 514.)

neglect, or child abandonment."[4] The Immigration and Nationality Act (INA) (8 U.S.C. § 1101 et seq.) and other immigration statutes do not define what constitutes a CIMT or a "crime of child abuse." (*Hernandez-Gonzalez v. Holder* (9th Cir. 2015) 778 F.3d 793, 801 ["[I]mmigration statutes do not specifically define offenses constituting crimes involving moral turpitude[.]"]; *Fregozo*, *supra*, 576 F.3d at p. 1035 [noting the BIA had only "recently supplied a definition of " 'crime of child abuse' "].)

Although no statutory definition exists, federal courts have long interpreted what crimes constitute a CIMT. (E.g., *Jordan v. De George* (1951) 341 U.S. 223, 229, fn. 14 [noting that the term "moral turpitude" first appeared in the Act of March 3, 1891 (26 Stat. 1084)].) Determining whether a crime qualifies as a CIMT requires analysis of each individual statute setting forth a state crime. (*Escobar v. Lynch* (9th Cir. 2017) 846 F.3d 1019, 1024, citing *Taylor v. United States* (1990) 495 U.S. 575, 598–602.) It is difficult to determine whether a state crime is a CIMT without case law because federal courts "have not articulated 'a consistent or easily applied set of criteria' to determine when a state offense involves moral turpitude." (*Menendez v. Whitaker* (9th Cir. 2018) 908 F.3d 467, 472–473; *Almanza-Arenas v. Lynch* (9th Cir. 2016) 815 F.3d 469, 483 (en banc) (Owens, J., concurring) [noting the "only consistency in these cases [defining moral turpitude] is their arbitrariness"].)

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[4] The Board of Immigration Appeals (BIA), which handles appeals from immigration courts, first defined a "crime of child abuse" in 2008 (after defendant pled guilty) as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." (*Matter of Velazquez-Herrera* (BIA 2008) 24 I. & N. Dec. 503, 512 (*Velazquez*).) "At a minimum," the BIA indicated, "this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight [and] mental or emotional harm, including acts injurious to morals." (*Ibid.*) The BIA thus held that, although "child abuse" is not limited to the infliction of physical harm, the perpetrator's actions, either intentional or criminally negligent, must actually inflict some form of injury on a child. (*Ibid.*) The Ninth Circuit first adopted the BIA's definition from *Velazquez* in *Fregozo v. Holder* (9th Cir. 2009) 576 F.3d 1030, 1036–1037 (*Fregozo*).

When defendant pled guilty, the federal courts and BIA had not published any opinions analyzing whether a violation of Penal Code section 273a, subdivision (b) was a CIMT. (*Fregozo*, *supra*, 576 F.3d at p. 1034.) The courts and the BIA still have yet to publish a case examining whether Penal Code section 273a, subdivision (b) is a CIMT.

Similarly, at the time defendant pled guilty, the federal courts and BIA had not yet published a decision defining the term "child abuse" or determining whether Penal Code section 273a, subdivision (b) was a crime of child abuse. (*Fregozo*, *supra*, 576 F.3d at pp. 1035–1036.) But since defendant's guilty plea, the federal courts and the BIA have published cases defining child abuse. (*Fregozo*, *supra*, 576 F.3d at pp. 1036–1037 [adopting BIA definition of child abuse in *Velazquez*, *supra*, 24 I. & N. Dec. at p. 512].) They have also since published cases suggesting that not all violations of Penal Code section 273a, subdivision (b) qualify as child abuse. (E.g., *Alvarez-Cerriteno v. Sessions* (9th Cir. 2018) 899 F.3d 774, 783; *Matter of Mendoza Osorio* (BIA 2016) 26 I. & N. Dec. 703, 711 [citing Penal Code section 273a, subdivision (b) as an example of a "child endangerment statute[ ] that do[es] not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the [INA]"].)

Here, the trial court credited McEntee's statement that he informed defendant that pleading guilty could result in him being deported, removed, or excluded from the United States. Based on the state of the law at the time defendant pled guilty, McEntee provided the most accurate advice possible to defendant: McEntee told defendant his guilty plea "would have [immigration] consequences . . . [as] [i]t could subject him to deportation, removal, or exclusion [from the United States]." Indeed, the immigration consequences attendant to his plea remain uncertain to this day because the federal courts and the BIA have still not published an opinion determining whether a violation of Penal Code section 273a, subdivision (b) is a CIMT, although case law now suggests his convictions are not crimes of child abuse.

Despite the lack of published authority at the time, defendant asserts that his attorney should have known that pleading to Penal Code section 273a, subdivision (b) would result in immigration consequences because the conviction qualified as either a

CIMT or crime of child abuse. Defendant relies on two Ninth Circuit cases decided years after he pled guilty to support his argument. The first case defendant cites is *Fregozo*, which held that Penal Code section 273a, subdivision (b) is not categorically a crime of child abuse because it is broader than the generic federal crime, which requires more than conduct that "creates only the bare potential for nonserious harm to a child." (*Fregozo, supra*, 576 F.3d at p. 1038.) *Fregozo* further held that Penal Code section 273, subdivision (b) is divisible and that some conduct criminalized by Penal Code section 273a, subdivision (b) might qualify as a crime of child abuse under the INA, while some conduct resulting only in potential harm (for example, driving drunk with two children in the car) might not. (*Ibid.*)

Defendant also cites *Martinez-Cedillo v. Sessions* (9th Cir. 2018) 896 F.3d 979, 993 (*Martinez-Cedillo*), which held that a violation of Penal Code section 273a, *subdivision (a)*, not subdivision (b), was categorically a crime of child abuse. However, defendant's reliance on *Martinez-Cedillo* is misplaced as it concerns a different crime (with different elements) under the same Penal Code section. Furthermore, since the parties briefed this case, the Ninth Circuit has vacated and designated its earlier *Martinez-Cedillo* decision as non-precedential. (*Martinez-Cedillo v. Barr* (9th Cir. 2019) 923 F.3d 1162 [vacating *Martinez-Cedillo*].)

Defendant also relies on a California case holding that Penal Code section 273a was "intended to protect a child from an abusive situation in which the probability of serious injury is great." (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.) However, the quoted comment is inapposite because the elements of a criminal statute, not the intent behind it, determine whether a crime constitutes a removable offense for immigration proceedings. (*Fregozo, supra*, 576 F.3d at pp. 1034–1035.)

In sum, we conclude that it was and remains unclear whether defendant's two misdemeanor convictions for violating Penal Code section 273a, subdivision (b) rendered him ineligible to apply for cancellation of removal; accordingly, McEntee's advice on the possible immigration consequences of the plea was accurate.

B. Likelihood Defendant Would Have Rejected the Plea Deal

Defendant maintains that he would have rejected the plea had he known the immigration consequences at the time. We review the record to determine whether defendant would not have accepted the plea deal, including the strength of the evidence against defendant, the possible immigrations consequence of a guilty plea or proceeding to trial, and the importance of those consequences to defendant. (*Chen*, *supra*, 36 Cal.App.5th at pp. 1059–1060.)

We begin by noting defendant was aware of the immigration consequences because, as the trial court found based on McEntee's testimony, McEntee so informed him. (*Chen*, *supra*, 36 Cal.App.5th at p. 1059.) Defendant still elected to pled guilty. For this reason alone, we may affirm the trial court's order denying defendant's motion to vacate.

But even if we disagreed with the trial court's finding that McEntee advised defendant of the possible immigration consequences, his motion would still fail. First, no contemporaneous evidence corroborates defendant's claim that he would not have pled had known the immigration consequences. (*Lee v. United States*, *supra*, __ U.S. at p. __ [137 S.Ct. at p. 1967].) The trial court did not abuse its discretion in implicitly giving little weight to defendant's declarations because they contradict one another and are inconsistent with the evidence. For example, defendant initially declared that the driver of the car he hit had requested to follow defendant to verify defendant's address only to later claim that it was a friend of the driver whom he had hit who made this request. In addition, defendant's first declaration claimed that he "was involved in a small fender-bender with another car" even though the driver described his vehicle as "totaled" at defendant's sentencing hearing, a fact the probation officer later confirmed.

The strength of the evidence also strongly suggests defendant would likely still have accepted the plea deal. (*Chen*, *supra*, 36 Cal.App.5th at p. 1060.) As McEntee explained, the blood alcohol tests and independent witnesses were strong evidence of defendant's guilt. The defenses proffered in defendant's two declarations were not reasonably viable given the extensive and critical contradictions between the two

declarations and the prosecution's evidence. With no viable defenses and a favorable offer, defendant cannot show he was prejudiced by "accepting a guilty plea that offer[ed] him a better resolution than would be likely after trial." (*Lee*, *supra*, __ U.S. at p. __ [137 S.Ct. at p. 1966].)

Accepting the plea deal also placed defendant in a better position to apply for immigration relief than he likely would have been in had he gone to trial. Defendant risked five felony convictions if he went to trial, while accepting the deal meant that he would only sustain a single felony conviction and three misdemeanor convictions, including the two for child endangerment. Although it is unclear whether Penal Code section 273a, subdivision (b) is a crime of moral turpitude, *Fregozo* suggests that child endangerment under Penal Code section 273a, subdivision (b) was not a crime of "child abuse." (*Fregozo, supra,* 576 F.3d at pp. 1037–1038.) Moreover, McEntee was reasonably concerned that immigration officials were more likely to discover defendant's presence in the United States and deport him if he remained in custody serving a longer sentence.

Finally, while we acknowledge that immigration consequences were important to defendant (*Chen*, *supra*, 36 Cal.App.5th at p. 1061), we note that increased custodial time and severity of the charges also had potentially adverse immigration consequences for defendant.[5] We therefore conclude that defendant cannot show he would have rejected the plea deal.

C. Ineffective Assistance of Counsel

Defendant claims the trial court improperly rested its decision on the incorrect standard, whether defendant had shown ineffective assistance of counsel, while simultaneously "ignor[ing] other evidence showing [he] did not meaningfully understand or knowingly accept the consequences of his plea agreement regardless of whether or not

[5] This is especially true because, in 2005, defendant was ineligible for cancellation of removal because he had not been physically present in the United States for 10 years. (8 U.S.C. § 1229b, subd. (b).) As such, his continued presence in custody would likely have increased his chances that immigration officials would find him and deport him or order him to voluntarily depart from the United States.

his attorney was ineffective." But even if defendant were required to prove he received ineffective assistance of counsel, defendant insists he has met that burden.

"Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under [Penal Code] section 1473.7." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*); Pen. Code, § 1473.7, subd. (e)(1).) There are two elements for demonstrating ineffective assistance of counsel: First, a defendant must demonstrate that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and second, the defendant must establish he or she was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) If a defendant fails to show either element, the ineffective assistance claim fails. (*Id.* at p. 697.)

We exercise our independent judgment in deciding whether the facts demonstrate deficient performance and resulting prejudice to a defendant, but we accord deference to the trial court's factual determinations if supported by substantial evidence. (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76; *People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1116; *People v. Tapia* (2018) 26 Cal.App.5th 942, 950.)

Defendant cannot show that he received ineffective assistance of counsel because his counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms at the time. (*Strickland, supra,* 466 U.S. at p. 687.) At the time, McEntee was only affirmatively required to inform defendant of immigration consequences if defendant directly asked; neither of defendant's declarations state that he asked about possible immigration consequences before pleading guilty. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1480–1482 (*Soriano*).) The requirement that defense counsel affirmatively inform defendants of immigration consequence only arose with the United States Supreme Court's decision in *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), which was not retroactive. (*Id.* at pp. 365, 369; *Chaidez v. United States*

(2013) 568 U.S. 342, 352–354 (*Chaidez*) [holding *Padilla* was not retroactive].) McEntee nevertheless informed defendant of the attendant possible immigration consequences of pleading guilty. As this advice was accurate, this case does not present a situation where an accused relied on his counsel's erroneous advice regarding the immigration consequences of a guilty plea. (*Padilla*, at p. 359.)

Defendant also cannot show that McEntee's advice prejudiced him. (*Strickland*, *supra*, 466 U.S. at p. 687.) As the trial court found, defendant knew his guilty plea could result in his deportation, exclusion, or removal from the United States. No evidence suggests the prosecution was inclined to offer an immigration safe plea. (*People v. Cruz-Lopez*, *supra*, 27 Cal.App.5th 212, 222.) And, other than defendant's after-the-fact statements, the record does not suggest that defendant would have declined the offer to plead to substantially reduced charges.

Notwithstanding defendant's inability to prove ineffective assistance or resulting prejudice, defendant cites distinguishable or irrelevant cases to support his ineffective assistance claim. Defendant principally relies on *Soriano* to assert that defense counsel has a duty to research and meaningfully advise a defendant of immigration consequences attendant to a plea as a general matter. (*Soriano*, *supra*, 194 Cal.App.3d at pp. 1480–1482.) But that was not *Soriano*'s holding. Rather, *Soriano* held that defense counsel must research immigration consequences and provide advice to a defendant who asked about such consequences. (*Id.* at p. 1482.) As discussed, the obligation to affirmatively advise defendants of immigration consequences came years after defendant's guilty plea with the United States Supreme Court's ruling in *Padilla*. (*Padilla*, *supra*, 559 U.S. at pp. 365, 369; *Chaidez*, *supra*, 568 U.S. at pp. 352–354.)

Defendant also cites *People v. Bautista* (2004) 115 Cal.App.4th 229, 240 (*Bautista*), to support his claim that McEntee should have provided him with a "meaningful consultation" about potential immigration consequences. The *Bautista* court found ineffective assistance of counsel because the defendant's attorney did not attempt to plead up to a greater offense that was not an aggravated felony under federal immigration law. (*Id*. at pp. 239–242.) Instead, the evidence in *Bautista* showed that the

defense attorney's strategy was simply to bargain for "the most lenient sentence possible." (*Id.* at p. 238.)

But *Bautista* is not persuasive because its entire analysis is predicated on the reasonable probability, based on testimony about prior plea bargains, that the prosecutor and trial court would have been amenable to allowing the defendant, who was a long-time permanent resident, to "plead up" to a non-aggravated felony. (*Bautista, supra,* 115 Cal.App.4th at pp. 238–239.) That is not the case here, where no evidence suggests the deputy district attorneys assigned to the case would have extended a different immigration-safe offer. Moreover, unlike the attorney in *Bautista*, McEntee considered the possible immigration consequences of the plea deal and advised defendant that the plea deal would have adverse immigration consequences as it could result in his deportation, removal, or exclusion from the United States. (*Id*. at p. 240.) McEntee also reasonably considered that defendant's lack of immigration status meant immigration officials were more likely to notice he was in the United States illegally the longer he remained in custody.

Finally, defendant claims the trial court focused on the "good deal" McEntee secured on his behalf without considering whether the plea deal had adverse immigration consequences that could have been avoided by accepting a stiffer punishment. This argument ignores McEntee's concerns that increased incarceration meant immigration authorities were likelier to find defendant and deport him.

We therefore conclude that defendant has also failed to show he received ineffective assistance of counsel or that he was prejudiced by his counsel's assistance.

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.